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bracing the whole human race, one that discarded the 'dry husks of creeds' and planted itself upon the broadest philanthropy and tolerance."

Man's domestic life is a sure and unerring index to his heart. The home life of Major Scott was beautiful.

> "A loving wife beguiled him more
> Than fame's emblazoned zeal."

This analysis of his character must suffice. The story of his life has been well told by others. He died in the prime and vigor of his intellectual strength and in the midst of his usefulness.

> "Untainted by the guilty bribe,
> Uncursed amidst the harpy tribe;
> No orphan's cry to wound my ear,
> My honour and my conscience clear;
> Thus may I calmly meet my end,
> Thus to the grave in peace descend."

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"DYING WITHOUT ISSUE" IN VIRGINIA.

No one interested in questions relating to the law of Real Estate in Virginia can have read Prof. Graves' article in the February number of the REGISTER, entitled "Executory Interests," without pleasure and profit. The writer, gratefully acknowledging his indebtedness, ventures to make some suggestions which may possibly serve to modify in some degree one of the conclusions reached by Prof. Graves. He offers these suggestions with diffidence, due to his respect for the learning and ability of the eminent jurist who has so well debated the questions involved. The views presented seem to him reasonable, however, and he therefore ventures to give them publication.

Stripped of immaterial matter, the point to be herein considered is the effect, in case of a devise "to A for life, and if he die without issue, to B in fee," of the Virginia statute passed in 1820 providing that "*every limitation* in any deed or will, contingent upon the dying of any person without heirs, or heirs of the body, or issue of the body, or children, or offspring, or descendant, or other relative, shall be *construed* a *limitation to take effect when* such person shall die, not having such heir, or issue, or child, or offspring, or descendant, or other

relative, as the case may be, *living at the time of his death or born to him within ten months thereafter,* unless the intention of such limitation be otherwise plainly declared on the face of the deed or will creating it." See 1 Rev. Code (1819), ch. 99, sec. 26; Va. Code (1887), sec. 2422.

Prior to 1776, in case of such a devise, by a necessary, or almost necessary, implication, a remainder was interpolated, after A's life-estate, to A's issue, so that the devise would be construed as if it read: "To A for life, remainder to A's issue, and if A die without issue, then to B in fee." Such a devise, by the operation of the rule in *Shelley's Case,* prior to 1776, would have vested an estate tail in A, with a vested remainder to B in fee, upon a failure of the estate tail.

After the statute of 1776, converting estates tail into estates in fee simple, A would have taken an estate tail, as before, but now converted into a fee-simple, and B's estate would have been void as a remainder because limited after a vested fee-simple, and invalid as an executory limitation, because of the doctrine of *Carter* v. *Tyler* (1 Call, 165), and also because limited after an indefinite failure of issue.

Two statutes were passed in 1820, which materially affect this limitation. One of these abolished the doctrine of *Carter* v. *Tyler,* providing, in substance, that any limitation which would have been valid if originally limited upon a fee-simple, should be valid if limited after a fee-tail converted into a fee-simple. The other statute is the one first quoted, which had the effect of removing the objection of remoteness which had previously invalidated the limitation to B. Professor Graves, however, gives it a more far-reaching effect, viewing it as not only intended to validate the limitation to B, but as intended to alter the very language of the will itself.

Thus, Professor Graves thinks it necessary, after the statute of 1820, to read the will thus: "To A for life, and if he die without issue living at his death or born within ten months thereafter, to B in fee." And from this inference as to the construction to be placed upon the act of 1820, he draws the further inference that the implied remainder to A's issue must be correspondingly altered. And he concludes that the whole devise, expressed in language, must read as follows: "To A for life, remainder to A's issue living at his death or born within ten months thereafter, and if A die without issue living at his death or born within ten months thereafter, to B in fee." This construction, founded upon the two inferences above mentioned, gives A, even prior to the abolition of the rule in *Shelley's Case,* a life estate, with contingent re-

mainder in fee in the issue described, and should that remainder fail to vest by reason of want of such issue, then a remainder to B in fee—in other words, a remainder on a double contingency (*Warner* v. *Mason*, 5 Munf. 242).

If Professor Graves' inferences are correct, there can be little doubt that his conclusion is correct also. It is these two inferences of his which may perhaps be modified by the suggestions about to be offered. We shall consider them separately.

I.

The first question is whether the act of 1820 was intended to alter the language of the devise itself, adding words which the testator had not expressed. Did the act intend to make a new will for the testator, or merely to carry out that intention by rendering valid the limitation to B, which would otherwise have been invalid?

The writer confesses that he finds it very difficult to conceive, either upon principle or upon the strict rules of statutory construction, that the legislature intended to alter the language of the testator, and thus make a new will for him, especially when the manifest object of the act was really to effectuate his intention by validating the limitation to B otherwise invalid for remoteness. Certainly no alteration of the language used by the testator need be inferred from the terms of the statute. That act was clearly directed towards the ultimate limitation to B, *after* the phrase "if he die without issue." It does not deal with the construction of *that phrase*, but with the construction of the *subsequent limitation.*

This will become more patent, if the language of the statute be closely noticed. It provides that "*every limitation* in any deed or will *contingent upon* the dying of any person without . . . issue . . . shall be *construed* a *limitation* to *take effect when* such person shall die, not having such . . . issue . . . living at the time of his death, or born to him within ten months thereafter," etc.

It will be here observed that the statute does not undertake to construe the phrase "if he die without issue;" it is the "limitation contingent upon" that phrase, which is therein construed, and that limitation is merely construed to be "a limitation *to take effect when* such person shall die without issue living at his death or born within ten months thereafter." The act refers entirely to the time when that subsequent limitation is to be supposed to take effect.

The statute does not alter, and was not intended to alter, the lan-

guage used by the testator in the will, but merely provides that the subsequent limitation shall have the same force and effect, *as if* it were limited upon a dying without issue, etc., living at A's death, or born within ten months thereafter.

If this be the correct interpretation of the statute of 1820, it would follow that there is neither reason nor warrant to alter the original language of the devise in the least, the subsequent limitation to B being made good by the inherent force of the statute itself, and not by reason of any statutory modification of the testator's language.

Hence the devise would still read, as before 1820: "To A for life, and if he die without issue, to B in fee," the only effect of the statute of 1820 being to validate the limitation to B. And from this language the implication of a remainder to A's "issue" is just as necessary as it was prior to 1820. Inserting in express language this implied remainder, the devise would read, as before, "To A for life, remainder to his issue, and if he die without issue, to B." Upon this language, it is evident that the rule in *Shelley's Case* would be as applicable, down to 1850, as it was prior to 1820, and down to 1850 A would take an estate tail converted into a fee simple, while between those periods, B would take an estate, valid as an executory limitation.

It must be admitted, however, that there is one Virginia case (but only one, so far as the writer, after a somewhat careful search, has been able to discover) which treats the statute as altering the language used by the testator. This is the case of *Wine* v. *Markwood*, 31 Gratt. 43, 50–51 (1878), which contains an apparently rather loosely considered *dictum* to that effect. As a matter of fact, there was not the least occasion for the court to pass upon the interpretation of the act of 1820 in that case, as it arose upon a devise taking effect after the statute abolishing the rule in *Shelley's Case*. The devise was in effect the same as the one under discussion; and the dispute was between the issue of the life-tenant on the one side, and the party claiming under a residuary clause, on the other.

Prior to the abolition of the rule in *Shelley's Case*, it was a most important question whether the remainder was to the "issue" generally, or to the "issue living at life-tenant's death or born within ten months thereafter." In the first case, the rule applied, vesting the inheritance in the ancestor; in the second it did not, the issue taking by way of contingent remainder.

But after the rule was abolished, the issue, if any, took in all cases by way of contingent remainder, and identically the same individuals

would take, whether the remainder was to the issue generally, or to the issue living at the ancestor's death or born within ten months thereafter. That was, therefore, after 1850, an entirely immaterial question, and the court seems to have treated it as such, merely assuming, without citing any authority and without argument, that the remainder would go to the "issue living at the death of the life-tenant, or born to him within ten months thereafter."

It is submitted, therefore, that the construction of the act of 1820 here advanced is quite tenable, and, to the writer, it seems the most reasonable.

II.

We now come to the consideration of the second of Professor Graves' inferences. Let us admit that the purpose of the act of 1820 was to make a new will for the testator, to add words which the testator has not used, and to change the words "if he die without issue" contained in the will, into the phrase "if he die without issue living at his death or born to him within ten months thereafter."

I assume that the phrase in the statute "born *to him*" does not mean begotten *by him*, for the same phrase is applied to a limitation contingent upon the person's dying without *heirs general*. The whole context of the statute clearly shows that the phrase "born to him" is equivalent to the simple word "born." Thus viewed, "issue born to him" would, under the statute, mean not only children, but grandchildren, great-grandchildren, or any other descendants however remote, "living at A's death or born within ten months thereafter."

The estate then, under the supposed statutory language of the devise, is only to go over to B in the event that A dies without issue [however remote], living at his death or born within ten months thereafter. And since this comprehends all the issue that A can conceivably have (for no man can possibly have any issue after his death, who are not either living at the time of his death or born within ten months thereafter), it is manifest that the testator's solicitude for A's "issue," including "the whole line of A's issue," has in no wise abated, and is just as strong and just as effectual as ever. The testator does not intend the estate to go over to B, under the supposed language of the will, until every possibility of issue of A is exhausted. It is certainly therefore natural to presume that so long as there is any possibility of A's issue, he intends the issue to take—that is, he intends the estate to go to A's "issue," if there is any—not to his children only, or his grandchildren, but his "issue" [however remote].

In other words, the testator, if he should, aided by the act of 1820, express his intention plainly in language, the devise would read: "To A for life, *remainder to his issue*, but if A die without issue living at his death or born within ten months thereafter, to B in fee."

Here again, should this be the language of the devise, the rule in *Shelley's Case*, prior to 1850, would clearly apply, vesting an estate tail in A, converted into a fee-simple.

The English decisions are of no authority on this question, the English statute on which they are based being essentially different from the Virginia act. The former statute construes the *phrase "die without issue"* to mean "a failure of issue in the life-time or at the death" of the party.

It will be seen, therefore, that there are two material points of difference between the English and the Virginia statutes: In the first place, the English statute expressly alters the language used by the testator, and thereby validates the subsequent limitation to B, while the Virginia statute would seem to make B's estate valid by its own inherent force, leaving the testator's language unchanged. In the second place, the English statute confines the failure of issue to the lifetime of the ancestor, omitting the ten months after his death during which issue may be born. That statute therefore does not contemplate, as our statute does, a complete and entire exhaustion of A's issue, before the estate shall go over to B, but only a partial extinction of the issue. Hence, under the English statute, there is no reason to think the testator intended, upon A's death, that the estate should pass to all of A's possible issue; indeed, he could not well have so intended, or he would not have permitted it to go over to B, before the possibility of A's issue was exhausted.

The English statute certainly meets squarely both the arguments herein advanced against Prof. Graves' view, which, under that statute, would probably have to be accepted as correct. But the Virginia statute, as has been pointed out, differs materially from the English.

Let us now briefly examine the Virginia cases and see how far they support either view. After a somewhat diligent search, the writer has only found three cases bearing materially upon the point in dispute, and two of these contain mere *dicta*, not always carefully considered.

1. *Jiggetts* v. *Davis*, 1 Leigh, 368, 418–'20 (1829).

This is the first of these cases in point of time. Therein Judge

Cabell, in the course of his decision, advances the opinion that if an estate be devised "to A for life, but if he die without issue *living at his death*, then to B," this merely marks the contingency upon which the estate goes over, and does not enlarge A's estate.

In respect to this *dictum*, there are two points which differentiate it from the case in hand, and make it wholly inapplicable thereto: *First*, he supposes the phrase "living at his death" to be part of the express language used by the testator in his will; *secondly*, his example does not necessarily involve the complete exhaustion of all possible issue of A, since issue may be born within ten months after A's death.

In other words, this is the identical case which arises under the *English* statute, above referred to, but decides nothing whatever with regard to the construction of the Virginia statute.

2. *Tinsley* v. *Jones*, 13 Gratt. 289, 295–'7, 298 (1856).

This case, when analysed, seems to go even further in the direction of the views herein advanced, than the writer would perhaps venture to go.

In that case, the devise, taking effect in 1807, was to J, without any words of inheritance. Testator then proceeded as follows: "It is my will, if my said son J die without issue, that the property given him shall go to his brother F. It being my will and desire then, and in that case, and upon the happening of the event of my son J's death, that the land near W, which would otherwise be F's share, be sold and the money equally divided between my surviving children."

This devise, it will be observed, took effect in 1807, so that the act of 1820 had no application whatever, nor was it noticed in the case.

Moncure, J., delivering the unanimous opinion of the court, held that, in the absence of words of inheritance, under the circumstances, J took only a life estate under the will (pp. 295–'7), which was enlarged into a fee tail, converted into a fee simple, by the words "if J die without issue," notwithstanding the subsequent words "upon the happening of the event of my son J's death," etc.

It was contended by counsel (p. 297) that the words "die without issue" were used in the restricted sense of issue "living at the death" of J, who should not therefore take an estate tail. Judge Moncure thus disposes of that question (p. 298): "The result of what I have said is that in my opinion J took an estate tail in the land devised to him, with remainder thereon to F. *It is not material to inquire* whether

that remainder is limited to take effect upon the death of J *without issue indefinitely*, or *without issue living at his death;* as by the act for docking entails, all remainders, as well contingent as vested, dependent on the estate tail, are utterly barred."

The learned judge here plainly treats the contingency, involving the definite or indefinite failure of issue as affecting only the subsequent limitation, and therefore as immaterial with respect to the estate tail taken by the life-tenant, which was the question in dispute; that is, the court treat the phrase "if he die without issue living at his death" as in no wise affecting the implied remainder to the "*issue*" *generally.*

In thus deciding, the court go further possibly than the writer would be disposed to go, for they ignore not only the distinction between *definite* and *indefinite* failure of issue (in which it is the aim of this article to show they were correct), but also ignore the distinction between a *partial* and *complete* failure of the issue, in which they are opposed by the *dictum* of Judge Cabell in *Jiggetts* v. *Davis*, above cited. At least it cannot be denied that the implication of a remainder to the "general issue" is very much strengthened, if the contingency upon which the estate is to go over is a *complete* failure of issue, as by the use of the phrase, "if he die without issue living at his death *or born within ten months thereafter.*"

It must be observed that this is an outright decision, however, and no *dictum*, as the very question in dispute was whether J took an estate-tail.

With reference to the subject under discussion, the point here decided, most worthy of notice, is that the implied remainder to the "general issue" is not affected by the language used in marking the contingency upon which the estate is to go over.

3. *Wine* v. *Markwood*, 31 Gratt. 43, 50–51 (1878).

This case, already noted, leans rather to Prof. Graves' construction of the statute of 1820, and to the view that the statute was intended to alter the very language of the will itself.

The case arose upon a will taking effect in 1865, after the rule in *Shelley's Case* had been abolished, and when therefore there was no possibility of the life-tenant taking an estate tail. The language of the devise was similar to that under discussion.

The question was whether upon the death of S, the life-tenant, the issue should take or the party claiming under a residuary clause. The court, by Moncure, P., held that it went "to S for life, remainder to

his issue living at his death or born within ten months thereafter." Whether this was intended as equivalent to a remainder "to the whole line of the issue of S" (or to the "general issue" of S), the opinion does not state. Whether it was or not could make no possible difference after the abolition of the rule in *Shelley's Case*, since it would operate as a contingent remainder in either case, and identically the same parties would take as remaindermen.

It would seem, therefore, to be fair to presume that the court did not attempt to define with absolute precision the technical language in which the implied remainder should be couched.

It might be added, upon the authority of *Smith* v. *Chapman*, 1 H. & M. 298, Judge Roane's opinion, that since the ultimate remainder in this case was for the *life* of the remaindermen only, an intention was thereby shown to restrict the word "issue" to children of the first degree only. But this point is not mentioned in the decision.

Thus it will be seen that out of the three Virginia cases, one decides nothing; of the two remaining, one leans each way. The counsel who may hereafter have to uphold either view need surely not despair.

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A QUESTION UNDER THE BANKRUPT ACT.

MAY ONE WHO HAS MADE A GENERAL DEED OF ASSIGNMENT BE ADJUDGED A BANKRUPT WHERE HE IS SOLVENT AT THE TIME OF FILING THE PETITION?

In the construction of the recent Bankrupt Act passed by Congress and approved July 1, 1898, many interesting points will be raised by the alleged bankrupt and the petitioning creditors. In *Lea* v. *West*, 4 Va. Law Reg. 662, Judge Waddill held that a general deed of assignment for the benefit of creditors was an act of bankruptcy whether the grantor was solvent or insolvent. By section 3, subdivision 4, this is undoubtedly true. The fourth ground of bankrupty can be committed either by a solvent or insolvent debtor. Insolvency, by the statute, is not a constituent element of this ground of bankruptcy, as it is in the second and third grounds of bankruptcy. But, while insolvency is not a constituent element of all acts of bankruptcy, yet by section 3 *b*, it is an essential that the alleged bankrupt be insol-